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No. 04-163

In The

Supreme Court of the United States

LINDA LINGLE, Governor of Hawaii, et al.

Petitioners,

v.

CHEVRON U.S.A., INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

I *AGINS* ESTABLISHED ITS RULE BY HOLDING, NOT BY DICTUM, AND THE COURT HAS HEWED TO IT EVER SINCE 5

II TAKINGS AND DUE PROCESS ARE DIFFERENT THEORIES. THERE IS NEED AND ROOM FOR BOTH IN EVALUATING THE PROPRIETY OF REGULATIONS 8

A Economic Impact Has Never Been The *Sine Qua Non* Of The Takings Clause. 8

B A "Substantial Advancement" Analysis Is Not The Sole Province Of The Due Process Clause. 10

C The Regulators Over-Read The Court's Decision in *First English* 18

TABLE OF CONTENTS
(continued)

Page

III A MERE GOVERNMENTAL STATEMENT THAT REGULATION IS UNDERTAKEN TO ADVANCE THE PUBLIC INTEREST CANNOT BE ACCEPTED ON FAITH. REAL JUDICIAL INQUIRY IS REQUIRED..... 21

A The Bill of Rights Was Designed To Restrict The Power of Government. This Court Has Consistently Applied That Restriction Under The Takings Clause. 21

B An Elevated Level Of Judicial Scrutiny Is Necessary To Vindicate The Protection Intended By The Takings Clause. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon,
447 U.S. 255
(1980) .....2, 3, 5, 8, 9, 10, 15, ...17, 19, 22, 25, 28, 30

Andrus v. Allard,
444 U.S. 51 (1979) 6, 8

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) (en banc)..... 16

Armstrong v. U.S.,
364 U.S. 40 (1960) 29

Babbitt v. Sweet Home Chapter of Communities for a Great Or.,
515 U.S. 687 (1995) 2

Babbitt v. Youpee,
519 U.S. 234 (1997) 6, 9

Bateman v. City of West Bountiful,
89 F.3d 704 (10th Cir. 1996)..... 16

Berman v. Parker,
348 U.S. 26 (1954) 13, 15

Borden Ranch P'Ship v. U.S. Army Corps of Engineers,
537 U.S. 99 (2002) 2

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,
538 U.S. 188 (2003) 2

City of Monterey v. Del Monte Dunes,
526 U.S. 687 (1999) 2, 5, 7, 22

Page

Collins v. Harker Heights,
503 U.S. 115 (1992) 16

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 27

Del Monte Dunes at Monterey v. City of
Monterey, 95 F.3d 1422
(9th Cir. 1996) 7, 8, 23, 25, 29

Delaware, Lackawana & Western Ry. Co.
v. Morristown, 276 U.S. 182 (1928) 11

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2, 10, 24, 25, 27, 28

Ehrlich v. City of Culver City,
512 U.S. 1231 (1994) 25

First English Evangelical Lutheran Church
v. County of Los Angeles,
482 U.S. 304 (1987) 2, 12, 18, 19, 23

Florida Prepaid Postsecondary Ed.
Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999) 25

Florida Rock Indus., Inc. v. U.S.,
18 F.3d 1560 (Fed. Cir. 1994) 16

Graham v. Connor, 490 U.S. 386 (1989) 16

Hawaii Housing Auth. v. Midkiff,
467 U.S. 229 (1984) 12

Hodel v. Irving,
481 U.S. 704, 718 (1987) 6, 8, 9, 15, 18, 19, 28

Hughes v. Washington,
389 U.S. 290 (1967) 10

Page

Kaiser Aetna v. U.S.,
444 U.S. 164 (1979) 15

Kelo v. City of New London,
No. 04-108 4

Kelo v. City of New London,
843 A.2d 500 (Conn. 2004), cert.
granted, 125 S.Ct. 27 (2004) 2

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 21

Keystone Bituminous Coal Assn. v.
DeBenedictis, 480 U.S. 470
(1987) 6, 8, 11, 15, 18, 19

Levin v. Upper Makefield Township,
No. 04-500 27

Lindquist v. Buckingham Township,
No. 04-681 27

Lochner v. New York,
198 U.S. 45 (1905) 16, 27

Loretto v. Teleprompter Manhattan CATV
Corp., 458 U.S. 419 (1982) 9, 15

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 2, 15, 28

MacDonald, Sommer & Frates v. Yolo
County, 477 U.S. 340 (1986) 2, 15

Marbury v. Madison,
1 Cr. 137 (1803) 21

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 26

Page

Monell v. Department of Social Services, 436 U.S. 658 (1978) 17

Monroe v. Pape, 365 U.S. 167 (1961) 17

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 12

Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992) 26

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 2, 6, 8, 14, 18, 19, 23, 24, 25

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 2, 8, 12

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 26

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 3, 8, 9, 14, 15, 25, 29, 30

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 10, 11, 15, 22

Rochin v. California, 342 U.S. 165 (1952) 27

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537 (2004) 2

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 2, 10, 12, 15

San Remo Hotel v. City and County of San Francisco, No. 04-340 20

Page

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 2

South County Sand & Gravel v. Town of South Kingstown, 160 F.3d 834 (1st Cir. 1998) 16

Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725 (1997) 2

Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency, 535 U.S. 687 (2002) 2, 7, 8

U.S. v. Carolene Prods., 304 U.S. 144 (1938) 29

U.S. v. Vajakajian, 524 U.S. 321, 324 (1998) 25

United Artists v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003) 26

Williamson County Reg. Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). 2, 20

Winger v. Aires, 89 A.2d 521 (Pa. 1952) 22

Yee v. City of Escondido, 503 U.S. 519 (1992) 12

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTION

First Amendment 27

Fourth Amendment 27

Fifth Amendment 1, 2, 4, 27

STATUTES

42 U.S.C. § 1983 ..... 15, 17

OTHER AUTHORITIES

Eagle, Regulatory Takings, (2d ed. 2001) 27

Hentoff, Living the Bill of Rights (1998) 23

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 13

Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 2 (1971) 13

Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283 (1967) 13

With the joint written consent of the parties filed with the Clerk of the Court, the National Association of Home Builders (NAHB) respectfully submits this brief as *amicus curiae*.[1]

INTEREST OF *AMICUS CURIAE*

NAHB represents more than 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes, as well as apartment, condominium, commercial, and industrial structures, land developers, and remodelers. It is the voice of the American shelter industry. It is — and historically has been — vitally concerned with judicial decisions dealing with government regulation of property, with a particular interest in this Court's interpretation and application of the 5th Amendment.

NAHB has appeared before the Court as an *amicus curiae* or "of counsel" to property owners in a number of cases involving the rights and remedies of those adversely affected by governmental actions. These began with the case that has become the focal point at bench, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and continued with *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo*

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity other than *amicus*, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

County, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987);[2] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004) and *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004).

SUMMARY OF ARGUMENT

1. This Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), plainly held that a 5th Amendment taking of property occurs when a regulation fails to substantially advance a legitimate state interest, contrary to the repeated assertions of Petitioners and their *amici*, who insist that it was mere dictum. In *Agins*, the Court first described its two-pronged alternative test for regulatory takings and then held that the city's regulation substantially advanced a legitimate state interest, thus eliminating any need to determine whether there was any adverse economic impact. It has become a regulators' fiction, a modern urban myth, to describe the test as "dictum," but the regulators' position is nonetheless fiction. The test was an integral part of the Court's holding. Eliminating one of the test's two prongs would require overruling *Agins* and, at least in part, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), a result that would be as unfortunate for takings jurisprudence as it would be out of pattern with the Court's other decisions.

2. There is no basis for the Petitioners' charge that the *Agins* formulation was the result of this Court's "confusion" between takings and due process doctrine. Rather, as this Court's later opinions fleshed out, there is a substantial relationship between takings and due process that sometimes makes them resemble each other. The Court, for example, has explained that the breadth of the eminent domain power is "coterminous" with the scope of the police power, although the former is reviewed under the Takings Clause and the latter under the Due Process Clause.

The relationship between the two powers may be most clearly seen in the "public use" restriction on the power of eminent domain (otherwise an inherent power of government). If a deliberate attempt to exercise eminent domain is found not to be for a public use, then

[2] The Court's opinion cited NAHB's brief. (483 U.S. at 840.)

the taking is enjoined as invalid.[3] In similar fashion, if a regulation fails to substantially advance a legitimate state interest, it is also enjoined as invalid (with compensation for any temporary taking that occurred while the invalid regulation was enforced). Both theories operate under, and are judged by, the Takings Clause.

3. The real crux of the regulators' position here is not whether their actions are challenged under a taking theory or a due process theory, but what standard of review is applied. Regardless of the constitutional theory, they want a standard of review that is so deferential as to be a virtual rubber stamp. That does not fit with this Court's settled jurisprudence nor with this Nation's development.[4]

In order to vindicate the 5th Amendment's protection of the rights of private property owners, it is essential that the judiciary engage in an elevated form of review, something that will actually ensure that the Takings Clause is effectuated, not merely mouthed.

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[3] The public use issue is currently before the Court in *Kelo v. City of New London*, no. 04-108, set for oral argument the same day as this case.

[4] They have perhaps lost sight of the fact that our forebears revolted against the British because they had no real ability to have substantial regulatory review. (Events like the Boston tea party come to mind.)

I

AGINS ESTABLISHED ITS RULE BY HOLDING, NOT BY DICTUM, AND THE COURT HAS HEWED TO IT EVER SINCE.

The strange governmental premise at bench is that the regulators are merely asking the Court to clear away a bothersome "dictum" that has never formed a holding of the Court. (E.g., Lingle 25.) That is a false premise.[5] In opinions authored by a variety of Justices, the Court has regularly applied the test.

In *Agins*, the Court laid down the rule for evaluating regulatory taking claims (447 U.S. at 260) and then *applied* that rule *by holding* that the city had met the standard: "the zoning ordinances substantially

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[5] The Solicitor General's repetition of this argument (US 24) is particularly troublesome. The arguments of that office are rightly respected by this Court. But the Solicitor General never questioned the validity of the *Agins* formulation before its *amicus* brief in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) (as NAHB demonstrated in its own amicus brief in that case, pp. 16-17, fn. 5) and this Court refused to consider the argument there. Indeed, even in this case, the Solicitor General concedes that the Court upheld the regulation in *Agins* because it "*did* 'substantially advance legitimate governmental goals . . . ." (US 24, fn. 14; emphasis in original), plainly denoting a holding. So why attack the rule as "dictum" when it clearly was not and the Solicitor General knows it was not?

advance legitimate governmental goals." (447 U.S. at 261 [Powell, J.].) That was not dictum; it was *ratio decidendi*.

Thereafter, in *Hodel v. Irving*, 481 U.S. 704, 718 (1987), the Court struck down a federal statute, holding it went "too far" because its proper purpose would not always be advanced by its application. ([O'Connor, J.].)[6]

In *Nollan*, this Court again applied the standard and held that the California Coastal Commission had failed the test of advancing the public purpose and therefore its permit condition was invalid. (483 U.S. at 837 [Scalia, J.].)

In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court began its analysis of the constitutionality of the Eagle Protection Act by concluding that its terms reasonably advanced its purposes (444 U.S. at 57-58 [Brennan, J.]), presaging *Agins* and using the same kind of Takings Clause analysis to uphold the statute.

In *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987), the Court summarized the rule this way: "We have *held* that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests. . . .' [Citing *Agins*.]" (Emphasis added [Stevens, J.].)

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[6] Congress' later attempt to "fix" the statute was struck down for the same reasons. (*Babbitt v. Youpee*, 519 U.S. 234 [1997] [Ginsburg, J.].)

In *Del Monte Dunes*, a property owner proved at trial that "none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests." (*Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1430 [9th Cir. 1996], *aff'd sub nom. City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999].) The evidentiary clash is discussed in detail in the Court of Appeals' opinion (95 F.3d at 1430-1432), and noted with this Court's comment that the owner "submitted evidence *designed to undermine the validity of the asserted factual premises* for the city's denial of the final proposal. . . ." (526 U.S. at 699; emphasis added [Kennedy, J.].)[7]

More recently, in *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 687 (2002), the Court reiterated that considerations of "fairness and justice" could require relief under the Takings Clause if a regulation "did not substantially advance a legitimate state interest." (535 U.S. at 334 [Stevens, J.].) In support, the Court cited both *Agins* and *Del Monte Dunes*.

The "substantially advance" theory is an embedded part of Takings Clause jurisprudence. The

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[7] *Del Monte Dunes* was a 5-4 decision on the 7th Amendment issue of whether liability should have been decided by judge or jury, but the four dissenters agreed that a decision on the validity of the city's action was appropriate for trial under the Takings Clause. The only disagreement was on the question of who made that ultimate decision. (See 526 U.S. at 755, fn. 14.)

Court has used it to uphold regulations (*Agins*, *Andrus*), to strike down regulations (*Nollan*, *Hodel*), to uphold a compensatory award (*Del Monte Dunes*) and has referred to it repeatedly (e.g., *Keystone*, *Tahoe-Sierra*). Calling it dictum doesn't change those facts.

II

TAKINGS AND DUE PROCESS ARE DIFFERENT THEORIES. THERE IS NEED AND ROOM FOR BOTH IN EVALUATING THE PROPRIETY OF REGULATIONS.

The regulators assert that this Court was "mistaken" and "confus[ed]" about takings and due process when it established *Agins*' two part disjunctive test for a regulatory taking. (Lingle 23, 28.) NAHB demurs. The Court plainly recognized a proper sphere for each theory, and the relevance to the Takings Clause of both substantial advancement of legitimate interests and economic impact.

A

Economic Impact Has Never Been The *Sine Qua Non* Of The Takings Clause.

Agins was decided shortly after *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) — and *Penn Central* is recognized as the polestar of this Court's modern takings jurisprudence. (E.g., *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 327, fn. 23 [2002]; *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 [2001].)

In laying out the proper mode of analysis for regulatory taking cases, this Court made clear that there were many factors to be considered, and economic impact was merely one of a group of factors to consider in what must be "essentially ad hoc, factual inquiries." (*Penn Central*, 438 U.S. at 124.)

Thus, when *Agins* held that either economic impact or failure to substantially advance legitimate state interests would suffice to invoke the protection of the Takings Clause, it was merely amplifying what the Court established in *Penn Central* two years earlier. Later cases continued that development.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a case challenging a New York statute authorizing the installation of cable TV in apartment buildings over the owners' protests, the Court found a taking regardless of the fact that the amounts involved were *de minimis*.

In *Hodel v. Irving*, 481 U.S. 704 (1987), a case challenging a congressional scheme to escheat miniscule estates of Native Americans in order to reduce the government's administrative costs, the Court found a taking regardless of the fact that the property interests involved were worth less than $100 each. (See also *Babbitt v. Youpee*, 519 U.S. 234 [1997] [amended statute struck down in similar fashion].)

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court found that conditions to a land use permit amounted to a taking because they were not "roughly proportional" to the projected impact of the proposed development. A taking was found even though Mrs. Dolan "assuredly [was] able to derive *some* economic use from her property." (512 U.S. at 385, fn. 6; emphasis, the Court's.)

In short, although economic impact *can* be an important factor in regulatory takings, it is not the *sole* — or even determinative — factor. It never was.

B

A "Substantial Advancement" Analysis Is Not The Sole Province Of The Due Process Clause.

At the heart of the regulators' substantive argument is the neo-*Lochner*ian notion that "failure to substantially advance a legitimate state interest" is "really" a substantive due process standard, rather than a takings standard. (Lingle 23.)

But the *Agins* formulation fits with this Court's consistent view of regulatory takings as well as its view of the relationship of substantive due process to the enumerated protections in the Bill of Rights.

First, since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court's regulatory taking law has been premised on the concept that a taking occurs when an exercise of the police power goes "too far." All of the

Court's subsequent regulatory takings jurisprudence has explicated the meaning of "too far" and described how one draws that line. But the only way to determine that answer is to examine the regulatory action and determine precisely what it does and how it does it. (*Hughes v. Washington*, 389 U.S. 290, 298 [1967]; Stewart, J., concurring. See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-653 [1981]; Brennan, J., dissenting but apparently expressing the substantive view of a majority of the Court [see 450 U.S. at 633-634; Rehnquist, J., concurring].)

Plainly, one of the ways in which government regulators can go "too far" is by enacting regulations thought to be in the public interest but which, in fact, fail to substantially advance that interest.[8]

> "*Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute . . . ." (*Keystone*, 480 U.S. at 487, fn. 16.)

Justice Stevens analyzed the Court's application of the Takings Clause in *Pennsylvania Coal* this way:

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[8] Shortly after *Pennsylvania Coal*, the Court struck down another regulation as a taking because the government lacked a proper regulatory purpose. (*Delaware, Lackawana & Western Ry. Co. v. Morristown*, 276 U.S. 182, 195 [1928].)

> "In his opinion for the Court, Mr. Justice Sutherland *fused the two express constitutional restrictions on any state interference with private property* — that property shall not be taken without due process nor for a public purpose without just compensation — into a single standard." (*Moore v. City of East Cleveland*, 431 U.S. 494, 514 [1977]; Stevens, J., concurring.)

Thus, in Justice Stevens' view, the East Cleveland ordinance in *Moore* was invalidated *as a taking* because analysis showed there was no justification for the ordinance. (431 U.S. at 520.)

In *San Diego Gas*, Justice Brennan's nominally dissenting opinion concluded that California's courts had contradicted this Court's clear precedents by holding that "a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of law constitute a 'taking' within the meaning of the Fifth Amendment." (450 U.S. at 647.)[9]

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984), Justice O'Connor explained for the Court that "the 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." Justice O'Connor amplified this thought in *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992), a case challenging rent control regulations as a taking of property, concluding that a regulatory taking depends on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." Justice O'Connor then returned to this theme more recently in *Palazzolo*, showing how "[t]he first question" in a takings analysis is whether "application of a regulation constitutes a valid exercise of the police power." (533 U.S. at 636; O'Connor, J., concurring.)

In *Berman v. Parker*, 348 U.S. 26, 31 (1954), the Court evaluated "public use" in a direct condemnation case by noting that "[w]e deal, in other words, with what traditionally has been known as the police power."

As the Solicitor General put it in his *amicus curiae* brief in this case:

> "[I]ndeed the 'public use' requirement would be a proper basis under the Just Compensation Clause for any examination parallel to that under the Due Process Clause of whether the governmental action could rationally be expected to advance a legitimate public purpose." (US 22, fn. 10.)

In other words, the Takings and Due Process Clauses are not separated in hermetically sealed containers, as the regulators would have it. Rather, they are closely related — "fused," to use Justice Stevens'

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[9] Justice Brennan's view became the basis for the Court's decision in *First English*, which cites the Brennan dissent repeatedly and tracks its analysis.

word, or "coterminous," to borrow Justice O'Connor's.[10] A regulation that goes "too far," like the Hawaii statute at bench, violates the Takings Clause, regardless of any due process analysis. (*Nollan*, 483 U.S. at 835, fn. 3.) As the polestar *Penn Central* opinion put it, "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose." (438 U.S. at 127.)[11]

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[10] Scholars have long understood this, denigrating attempts to segregate the two powers. See, e.g., Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283, 292 (1967) ("illusory"); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1186 (1967) ("wordplay"); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 2 (1971) ("circular reasoning, and empty rhetoric").

[11] The Petitioners' attempt to deconstruct the word "substantial" (Lingle 47) is unconvincing. Plainly, the Court meant something by its use. The assertion that the word is "ambiguous" seems disingenuous. As the Court itself explained in *Nollan*, the word means more than the rational basis concept of due process cases. (483 U.S. at 834-835, fn. 3.) Acknowledging the *Nollan* analysis but describing it as "tentative" and said "in passing" (Lingle 48) does not further the inquiry. It is plain from a reading of the cases discussed in the text that the word has not been used casually and was, instead, intended to have meaning.

Thus, under *Penn Central*, it is not enough to say that a regulation is "reasonable" or has a "rational basis." That may be the issue under the Due Process Clause, but it is not the issue under the Takings Clause. Takings analysis requires examination of the necessity for the regulation as well (*Penn Central*, 438 U.S. at 127) and, accordingly, whether the regulation will actually accomplish its stated goals. And it requires that determination to be made on an "ad hoc" basis. The Court's requirement of ad hoc inquiry to determine Takings Clause liability has not been restricted to *Agins'* second prong, but has been a uniform requirement. (See *Penn Central*, 438 U.S. at 124; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 [1979]; *San Diego Gas*, 450 U.S. at 649-650 [Brennan, J., dissenting]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 [1982]; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 [1986]; *Keystone*, 480 U.S. at 474, 495; *Hodel*, 481 U.S. at 714; *Lucas*, 505 U.S. at 1015.)[12]

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[12] Some of the cases cited above involved as-applied challenges, others were facial; some involved regulatory takings, others were physical; some involved development denials, others conditions on development; some involved 42 U.S.C. § 1983, others did not; some were from state courts, others federal. But they *all* concerned Takings Clause challenges and they *all* required factual examination of the regulatory action to determine its validity. Indeed, this factual requirement pre-dates the Court's takings decisions during the last few decades. (See *Pennsylvania Coal*, 260 U.S. at 413; *Berman v. Parker*, 348 U.S. 26, 32 [1954].)

In *Lucas*, 505 U.S. at 1030, the Court mandated a "total takings inquiry" into a case's facts and background circumstances using the *Penn Central* rationale, except for those few cases that would fit within the *per se*, or categorical, takings categories.

Lower courts have followed *Penn Central*'s lead in examining the "necessity of regulation" under a Takings Clause analysis:

> "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those *necessary to achieve the public purpose*, and not allocating to some number of individuals, less than all, a burden that should be borne by all?" (*Florida Rock Indus., Inc. v. U.S.*, 18 F.3d 1560, 1571 [Fed. Cir. 1994]; emphasis added.)

Second, perhaps wary of resurrecting *Lochner v. New York*, 198 U.S. 45 (1905), the Court has not looked favorably on actions that would expand the reach of substantive due process. (See, e.g., *Collins v. Harker Heights*, 503 U.S. 115, 125 [1992] ["the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended"].)

To restrict the reach of substantive due process, *Graham v. Connor*, 490 U.S. 386 (1989) holds that, where a claim can be brought under one of the separately stated Bill of Rights guarantees, there is no

substantive due process claim. Some lower courts have interpreted *Graham* to preclude property owners from suing on substantive due process grounds because the Takings Clause provides an adequate constitutional remedy. (E.g., *Armendariz v. Penman*, 75 F.3d 1311, 1318-1320 [9th Cir. 1996] [en banc]; *South County Sand & Gravel v. Town of South Kingstown*, 160 F.3d 834, 835 [1st Cir. 1998]; *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 [10th Cir. 1996].)

The regulators' briefs say they want to reverse all that and increase the volume of substantive due process litigation. What they really want, as briefed *post*, pp. 24-29, is a lessened standard of review for their actions.

Beyond that, other than a cursory mention in the Petitioner's procedural summary (Lingle 4), the regulators' briefs fail even to acknowledge, much less account for, the fact that this constitutional challenge was brought under 42 U.S.C. § 1983.

The use of Section 1983 makes a difference. Ignoring it allows the regulators to argue that failure to advance a legitimate state interest *cannot* be a takings theory because there can be no taking without proper governmental action. (Lingle 18-19; US 22.) But Section 1983 alters that. Actions under that section are brought because of a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . ." (*Monroe v. Pape*, 365 U.S. 167, 184 [1961].) That statute was enacted to protect citizens against violations of their constitutional rights under color of state law,

including the specific problem of Takings Clause violations. (*Monell v. Department of Social Services*, 436 U.S. 658, 685-687 & fn. 45 [1978].)

Thus, in the context of Section 1983, the "substantial advancement" prong of *Agins* can be used in cases where regulations have already been invalidated to show the need for temporary taking compensation. The failure to substantially advance a legitimate state interest part of the takings rationale goes beyond due process and establishes liability in these circumstances.

C

The Regulators Over-Read The Court's Decision in *First English*.

The regulators' position is based largely on an over-reading of *First English*, asserting that it established compensation as the only remedy for a Takings Clause violation, thus showing that the analysis used below properly belongs to the Due Process Clause. (Lingle 18, 19, 22; US 17-22.)

While it is true that *First English* answered a question which had plagued courts for years, by concluding that the Takings Clause prohibits states from holding that compensation may *not* be awarded for regulatory takings of property, the Court did *not* hold that compensation is the *only* remedy available to Takings Clause victims. Other cases decided contemporaneously with *First English* (as well as *First English* itself) make this clear. (See *Keystone*, 480 U.S.

470; *Hodel*, 481 U.S. 704; *Nollan*, 483 U.S. 825.)

In *Keystone*, the first of 1987's multiple Takings Clause cases, the Court was faced with a challenge to the constitutionality of a statute requiring coal companies to leave a sufficient amount of coal in the ground to preclude subsidence, effectively prohibiting the mining of a substantial amount of coal. The coal companies sought injunctive relief. The important thing about *Keystone* is not *that* the Court upheld the statute, but the *way* it did so: the *merits* of the coal companies' arguments were painstakingly examined. If the *only* remedy for a regulatory taking were compensation, then the Court's opinion needed to be only one paragraph long. It could have dismissed the case on the ground that it sought the wrong remedy. But it did not. And *First English* was under active consideration at the time, having been argued less than two months before the *Keystone* opinion was filed.

Hodel was decided two months after *Keystone*. It tested the constitutionality of a federal statute designed to halt the intense fractionalization of Native American lands by prohibiting the transfer at death of miniscule estates. By statute, such estates would escheat to the appropriate tribe. There was no question about the public purpose of the statute, but the Court held it went too far. The statute was struck down, this time less than a month before *First English* would be filed.

First English itself talks of invalidating regulations that violate the Takings Clause. (See 482 U.S. at 317, 319, 320, 322.) Compensation is an

additional remedy to compensate for the temporary taking occurring between adoption of the regulation and its ultimate invalidation. (482 U.S. at 321.)

Then, two weeks after it decided *First English*, the Court decided *Nollan*. There, the property owners sought a writ of mandate to invalidate a condition attached to a development permit. No compensation was sought. With *First English* freshly on the books, the Court concluded that the permit condition effected a taking and turned to the remedy sought by the property owners. The Court granted the only relief sought, i.e., injunctive. If, as the regulators argue here, the only remedy for a taking is compensation, then the Court had no business granting some other form of relief.

Plainly, this Court's series of 1987 cases demonstrates that there is no single remedy under the Takings Clause. Injunctive relief against excessive regulation is not the sole province of the Due Process Clause. Depending on the facts, either monetary relief or injunctive relief may be appropriate. Here, in an application of *Agins*' first prong, the courts below determined that injunctive relief was the proper Takings Clause remedy on these facts. Because the economic impact of the regulation was not at issue, that result was both authorized and justified.[13]

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[13] As no compensation was sought, the case was properly filed in U.S. District Court without "ripening" under *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The operation of the *Williamson County* rule has been heavily criticized,

III

A MERE GOVERNMENTAL STATEMENT THAT REGULATION IS UNDERTAKEN TO ADVANCE THE PUBLIC INTEREST CANNOT BE ACCEPTED ON FAITH. REAL JUDICIAL INQUIRY IS REQUIRED.

Reviewing the constitutionality of legislative acts is neither to be sought nor taken lightly. However, such review is a necessary part of our constitutional system. As this Court explained, such review is undertaken:

> ". . . with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution." (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 [1963].)

Whether legislative action complies with the Constitution is a question for the judiciary — and has been since *Marbury v. Madison*, 1 Cr. 137 (1803).

A

The Bill of Rights Was Designed To Restrict The Power of Government. This Court Has Consistently Applied That Restriction Under The Takings Clause.

As Justice Holmes explained for the Court in its first regulatory taking case of the 20th century, "[t]he

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and will be reviewed later in the Term in *San Remo Hotel v. City and County of San Francisco*, No. 04-340.

greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922].)[14]

The problem is that the regulators refuse to recognize limits; they seek virtually unreviewable deference. With respect, as this Court recently held in *Del Monte Dunes*, 526 U.S. 687, that position is untenable. In *Del Monte*, the city and its *amici* protested against judicial "second-guessing" of regulatory decisions under the first prong of *Agins*, asking for the same kind of abject deference sought at bench. The Question Presented by the city was this:

> "Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to *reweigh evidence concerning the reasonableness* of the public entity's land use decision." (Petition, p. i; emphasis added.)

This Court's response was crisp and clear:

> "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error." (*Del Monte Dunes*, 526 U.S. at 707.)

Del Monte was a continuation of the Court's modern regulatory taking decisions. In *First English*, the Court concluded that compensation is an available remedy for a regulatory taking. The defendant county and its many *amici* had voiced fears that a governmental loss would cripple government's ability to govern. The Court rejected that hyperbolic plea, concluding that "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities . . . ." (482 U.S. at 321.)

Indeed, one might say that the entire purpose of the Bill of Rights is to restrict the exercise of governmental power.[15]

Two weeks after *First English*, the Court amplified its insistence that the protection afforded the rights of property owners be enforced, not evaded: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (*Nollan*, 483 U.S. at 841.)

As shown below, the Court's decisions under the Takings Clause have enforced this choice of protection

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[14] See also *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) (enjoining use of eminent domain as unnecessary): "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review."

[15] As Justice Douglas put it, "The Constitution and the Bill of Rights were designed to get Government off the backs of the people — all the people." (Quoted in Hentoff, Living the Bill of Rights 2 [1998].)

over inventive wordplay. Accepting the regulators' arguments at bench, and subjecting their actions only to minimal review, will undo the protection intended by the Constitution and enforced by the Court until now.

B

An Elevated Level Of Judicial Scrutiny Is Necessary To Vindicate The Protection Intended By The Takings Clause.

Candor is necessary. What the regulators are really complaining about is the standard of review (eventually discussed late in the Petitioners' brief [Lingle 37]). The theory under which review is made cannot be divorced from its standard of review. Indeed, the labeling process is otherwise meaningless: it would make no difference which constitutional violation was charged if the standard of review were the same.

What the regulators seek is to evade the heightened scrutiny for regulatory takings established in cases like *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 841 (1987).[16] Instead, they want to

[16] The regulators' briefs concede that *Nollan* and its eventual companion *Dolan* are fully applicable to property exactions attached as conditions to permits (Lingle 33; US 28), but seek to evade any *Nollan/Dolan* analysis by saying that those cases involve a special rule applicable only to such permit conditions.

They are right about the continuing validity of *Nollan* and *Dolan*, but wrong about their application

beyond the exaction context. First, nowhere in either case — or in *Agins* or *Penn Central*, for that matter — did the Court hold that the substantial advancement test required land dedication. To the contrary, in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), involving development fees, the Court issued a writ of certiorari, vacated the state court judgment, and remanded the matter for consideration in light of *Dolan*, which had just been decided. Ultimately, the California Supreme Court agreed with this Court and applied the *Nollan/Dolan* analysis to a purely monetary issue. (*Ehrlich v. City of Culver City*, 911 P.2d 429 [Cal. 1996], *cert. den.*, 117 S. Ct. 299 [1996].)

Second, their reliance on *Del Monte Dunes* (Lingle 32; US 27) is misplaced. There, this Court dealt with *Dolan*'s "rough proportionality" component, not the *Nollan/Agins* issue of "substantial advancement." In that context, the Court said that it had not yet applied the rough proportionality test beyond the exaction context (526 U.S. at 702), but never said that it would be improper to do so. In any event, assuming that the rough proportionality concept is restricted to exactions, nothing in the Court's jurisprudence suggests that the entire first prong of *Agins* is so restricted.

Third, both before and after *Del Monte Dunes*, the Court has stressed the proper role of proportionality analysis in judging the validity of legislative responses to perceived problems. (See *U.S. v. Vajakajian*, 524 U.S. 321, 324 [1998]; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627,

substitute due process, whose standard they gloss over as "rational basis" (US 21, fn. 9), i.e., that a regulation is acceptable if there is some rational basis for it that can be conjured up by a court after the fact, regardless of whether anyone who voted on the regulation ever considered it at all. (E.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 [1981].)

But that is not an accurate picture of due process as it is applied in land use cases. Property owners have not even had that loose standard applied to their claims.

The 1st Circuit, for example, has held that substantive due process is virtually unavailable in land use disputes, saying it has only "left the door *slightly ajar* for federal relief in *truly horrendous situations*. But . . . the threshold for establishing the requisite 'abuse of governmental power' is a *high one* indeed." (*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 [1st Cir. 1992]; emphasis added.)[17]

The 3d Circuit applies a "shocks the conscience" standard (*United Artists v. Township of Warrington*, 316 F.3d 392, 400 [3d Cir. 2003]),[18] even though that standard devolved from police actions like *Rochin v. California*, 342 U.S. 165 (1952) (forced stomach pumping) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (high speed car chase through residential neighborhood), which had nothing to do with the more carefully thought out economic and land use regulations dealt with in cases like this.

Thus, the regulators' desire to be thrown into the briar patch of substantive due process (a desire unthinkable for regulators in the *Lochner* era) comes from an evident wish to slide into a form of judicial review that is exceedingly regulator-friendly.[19]

This Court is already on record as seeing "no reason why the Takings Clause of the Fifth Amendment,

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646 [1999].) Thus, nothing in *Del Monte Dunes* or any other of this Court's cases suggests that there is no need for a close nexus between regulatory means and ends. Quite the contrary.

[17] The 2d Circuit has been called "even more hostile" to such property owner claims than the 1st. (*Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1218 [6th Cir. 1992].)

[18] The validity of the 3d Circuit's standard is the subject of Petitions for Certiorari this Term in *Lindquist v. Buckingham Township*, No. 04-681 and *Levin v. Upper Makefield Township.*, No. 04-500, *cert den.*, 73 U.S.L.W. 3248 (Dec. 13, 2004).

[19] Professor Eagle has urged that, if the Court were to enforce a standard of "*meaningful* substantive due process" (Eagle, Regulatory Takings, § 12-2, p. 977 [2d ed. 2001]; emphasis added), i.e., review with a heightened level of actual scrutiny, then such a standard might provide appropriate constitutional protection. But that would require more than "rational basis" review and would certainly not subject property owners to the standards discussed above.

as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) The Court, in furtherance of that protection for property owners, has expressly refused to apply "rational basis" scrutiny to Takings Clause cases. (*Dolan*, 512 U.S. at 391.)[20]

If the first prong of *Agins* is eliminated, the rights protected by the Takings Clause will become poor relations, indeed. If regulators need do no more than appear in court and suggest possible reasons that might have supported their regulations, then the regulators will always prevail. That's not a rule of law, but an imperial ukase that ill serves our Constitution. As the Court put it, "such a justification can be formulated in practically every case" making review of even expressly stated regulatory intentions "a test of whether the legislature has a stupid staff." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025, fn. 12 [1992].)

That is why the Court was quite explicit when it remanded *Lucas* so the State could defend its legislation. The Court "emphasized[d] that to win its case, South Carolina must do more than proffer the legislature's declaration . . . or its conclusory assertion . . . ." (*Lucas*, 505 U.S. at 1031.) *A fortiori*, if the legislature's actual

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[20] The reason for that should be apparent: a regulation can be perfectly "rational" or "reasonable" but still not advance legitimate state interests one iota and may, in fact, be counterproductive. (See, e.g., *Hodel v. Irving*.) The courts below found that to be the case here.

formulation of a supposed justification is insufficient to validate legislation challenged under the Takings Clause — unless supported by facts produced at trial — then conjectured rationalizations under a "rational basis" review should not suffice either.

Reliance on *U.S. v. Carolene Prods.*, 304 U.S. 144 (1938) (Lingle 38; Govt. Organizations 10) overlooks that opinion's express recognition that any presumption of regulatory regularity is "narrower . . . when legislation appears on its face to be within a specific prohibition of the . . . first ten amendments." (304 U.S. at 152, fn. 4.) That is this case.

The ultimate goal in a takings inquiry is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. U.S.*, 364 U.S. 40, 49 [1960].) The way to achieve that goal is for a court to scrutinize the burden imposed on the property owner and measure, as *Penn Central* instructs (438 U.S. at 127), whether the means chosen are necessary to the desired end, and whether they will achieve that end.

CONCLUSION

The Takings Clause standard being challenged here is one that this Court has applied and discussed for decades. It has consistently inquired whether regulations "substantially advance a legitimate state interest," upholding some while striking down others.

The standard has worked well, allowing (as in *Del Monte Dunes*) an impartial examination of the workings of a regulatory scheme to determine whether it has the capacity to accomplish its goals or whether, in the alternative, it is an unnecessary imposition on the property owner (as the Court instructed lower courts to investigate in *Penn Central*).

The major item of concern in this case is not the legal theory of liability, but the standard of review of governmental action. The positions are starkly laid out. The regulators want virtual free rein, under a standard that — in the Court's words — only "a stupid staff" could fail to satisfy. Property owners, by contrast, ask for a standard that allows them to demonstrate a regulation's constitutional failure.

NAHB prays that the decision be affirmed, with an opinion explaining the continuing vitality of the *Agins* formula for enforcing the Takings Clause.

Respectfully submitted,

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